NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

CIS Congressional Information Service, Washington, D.C.

Calendar No. 411

101ST CONGRESS
1st Session

SENATE

REPORT
101-218

BUY INDIAN ACT AMENDMENTS OF 1989

NOVEMBER 20 (legislative day, NOVEMBER 6), 1989.—Ordered to be printed

Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 321]

The Select Committee on Indian Affairs to which was referred the bill (S. 321) having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

PURPOSE

The Buy Indian Act Amendments of 1989 update, revise, and consolidate existing Indian preference laws. S. 321 as modified recodifies and consolidates section 7(b) of the Indian Self-Determination Act (25 U.S.C. 450, et. seq.) with 25 U.S.C. sec. 47, the Buy Indian Act. S. 321 also addresses the abuses to Indian preference involving so-called "front" organizations that have taken unfair advantage of these programs; it clarifies the criteria and procedures for certification of eligible Indian businesses and establishes new enforcement mechanisms.

BACKGROUND

Under current law, the federal government provides a preference exclusively for Indian-owned business enterprises that wish to compete in bidding opportunities using two different laws: the Buy Indian Act (25 U.S.C 47) and Section 7(b) of the Indian Self-Determination Act (25 U.S.C. 450, et. seq.)

Buy Indian, enacted in 1910, authorizes but does not require bidding preference for Indian firms on prime contracts let by the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) involving appropriations which Congress intended for "the benefit of Indians." Section 7(b) of the Indian Self-Determination Act re-

S413-11

quires Federal agencies to utilize Indian preference "to the greatest extent feasible" on any contract or grant that is for the benefit of Indians. In addition to BIA and IHS projects, section 7(b) also involves contracts let by tribal governments where Federal funds are involved. It also applies to the contracts let by various Federal agencies, including the Indian housing program in the Department of Housing and Urban Development, Federal Highway Administration projects on reservations, and Indian-related projects administered by the Economic Development Administration.

In 1988, the BIA entered into 179 Buy Indian contracts with Indian firms totalling more than $54 million. The majority of these contracts (63) were road and bridge construction projects totaling $38 million. In addition, IHS and HUD made available more than $38 million and $148 million, respectively. However, it is clear from the extensive hearing record compiled by this Committee that these funds did not benefit Indian enterprises and Indian people to the extent that Congress intended.

The language of the "Buy Indian Act" first appeared in the Indian Affairs Appropriations Act of 1886. The Act states, "So far as may be practicable, Indian labor shall be employed and purchases of the products of Indian industry may be made on the open market in the discretion of the Secretary of the Interior." While the Act authorized Indian preference on prime contracts involving funds appropriated for the benefit of Indians, it provided little guidance for implementation. As a result, the BIA has never issued final implementing regulations, leading to an arbitrary Indian preference decision-making process.

Buy Indian was seldom utilized prior to 1963, at which time President Kennedy instituted an accelerated public works program. Since there were no regulations in existence, the BIA began to use internal procedures, which have varied over the course of time. For example, while the BIA originally dealt with firms that were "substantially Indian-owned," it has since used criteria calling for both 100% ownership and 51% ownership.

In addition to Buy Indian, section 7(b) of the Indian Self-Determination Act requires Federal agencies awarding contracts and grants to Indians to provide Indian preference "to the greatest extent feasible." Section 7(b) authority is relied upon by other Federal agencies, and involves subcontracting and employment opportunities on Federal contracts that are for the benefit of Indians.

The inconsistencies between the affirmative language of section 7(b) and the discretionary language of Buy Indian result in confusion about when Indian preference should be utlilized and also in the utilization of inconsistent eligibility criteria by various Federal agencies. In addition, it is unclear whether the original intent of Buy Indian was to stimulate reservation development, individual Indian business development, or Indian employment. Therefore, the focus of Indian preference programs administered by Federal agencies can differ depending on their definition of Indian preference goals. This, coupled with a lack of policy continuity in the BIA leadership, has created difficulty in consistently implementing Indian preference laws.

The confusion arising from the lack of Congressional direction about the intent of Indian preference manifested itself in a 1980

Supreme Court holding that Indian preference could not be applied to construction. *Andrus* v. *Glover Construction Co.*, 446 U.S. 608 (1980).

In *Glover,* the Glover Construction Company alleged that the term "products of Indian industry" in the Buy Indian Act does not apply to construction. The contrary view was that, while construction may not have been envisioned in 1910, today's circumstances are vastly different. A dissenting opinion in the Tenth Circuit Court of Appeals argued that failure to include construction would force Indians back to "the beads and blanket era."

The Federal Highway Act of 1983 contained language overturning *Glover* to the extent that it limited the use of Indian preference for road construction. However, BIA officials and operators of Indian business enterprises testified to the need for further clarification in this area. *Glover* also raises the need to clarify the circumstances under which Indian preference should be utilized outside of the construction arena. S. 321 provides this clarification.

SUMMARY OF MAJOR PROVISIONS

The Buy Indian Act Amendments for the first time clearly set out the goals and intent of Congress. The primary purpose of the law is maximize reservation economic development. It also seeks to minimize inconsistency and confusion by consolidating existing Indian preference laws under one umbrella.

The bill declares a major national goal of ensuring "theat the procurement of goods and services on Indian reservations or otherwise for the benefit of Indians shall be carried out in a manner that achieves the maximum benefit for Indian employment and business development." The Committee views economic self-sufficiency, increased Indian employment and business opportunity as essential in the elimination of poverty, alcoholism, high suicide rates, substandard housing, and other problems that plague Indian reservations.

The second major goal of this legislation is the elimination of front practices. By falsely certifying themselves as eligible for Indian preference status, front organizations unfairly compete with legitimate Indian enterprises for bonding and preference contracts. Fronts siphon badly needed economic resources away from reservation economies and damage the credibility of Indian- and other minority-preference programs.

Contracts for the benefit of Indians

S. 321 as introduced described funds as being for the benefit of Indians if "the contract furthers the special relationship between the United States and Indians." This requirement was criticized as being vague and undefinable, and has been replaced with the concept that funds awarded for the benefit of Indians include those used in a contract or grant where: (1) Indians are the primary beneficiaries; (2) the majority of the activity takes place on an Indian reservation; or (3) moneys are appropriated by Congress for education, medical attention, housing, agricultural and social welfare assistance to Indians.

IHS has expressed concern that S. 321 could interfere with its primary mission, the delivery of timely, quality health care to Indian people. IHS lets many contracts for such items as medical supplies, and requests the flexibility to supercede Indian preference when they feel it would adversely affect service delivery. It is the Committee's intent to accord IHS the flexibility to use its discretion in situations that could affect service delivery. However, we also wish to make clear that where IHS contracts do not directly affect immediate health care delivery, such as in construction, IHS shall be subject to all requirements under this act.

Consolidation of preference laws

Both the Select Committee on Indian Affairs and the Special Committee on Investigations received testimony that the existing inconsistencies in Indian preference laws cause confusion about when Indian preference should be utilized. Each agency has its own policies on when the use of Indian preference is appropriate, and on what constitutes an Indian preference enterprise.

Fronts

The lack of adequate enforcement and the difficulty Indian firms often have obtaining financial backing enables unscrupulous non-Indian operators to take unfair advantage of Indian preference contracts. These businesses defraud the Federal government of millions of dollars and blunt attempts to provide real Indian economic development opportunities.

The major reasons cited as enabling front organizations to thrive are: (1) inadequate definitions of "Indian Preference Enterprises;" (2) the inability of many Indian firms to obtain bonding; and (3) the lack of adequate enforcement and certification.

Hearings before the Special Committee on Investigations and the Select Committee on Indian Affairs highlighted the need to clarify and improve the administration of Indian preference policies to eliminate "fronts." The Special Committee found that virtually every high-volume Indian contractor has some relationship to a non-Indian owned firm. While some relationships are blatant vehicles the sole purpose of which is to enable non-Indian firms to obtain set-aside projects, others arise from the need for Indian firms to find adequate financing.

The Special Committee on Investigations heard testimony from a special agent of the Federal Bureau of Investigations that kickbacks and fronts are important problems that must be addressed. He testified that the confusion surrounding Indian preference creates an environment ripe for fraud and deception. Examples of fronts cited ran from blatant to more subtle forms of third-party control.

The most blatant form of front is where an Indian is asked to form a shell corporation which has no assets, equipment or employees. While the company may on paper receive as much as 100 percent of the profits, funds are siphoned off by the parent company through a variety of administrative fees and other arrangements.

In other front arrangements, a minority contractor may perform all work and be intimately involved in the decision-making process, but still remain financially beholden to the parent company. The

parent company may extract exorbitant fees from the contractor in return for providing a bond.

ADMINISTRATION AND ENFORCEMENT PROVISIONS

Under current law, any construction firm can qualify for Buy Indian preference by completing a form self-certifying as to Indian identity and ownership and filing it with the BIA or IHS. These agencies acknowledged their inability to adequately police the self-certification process. Instead, the two agencies rely on those in Indian country to report fraudulent operations.

Many construction firms testified that their claims to Indian preference eligibility have never been investigated by BIA, IHS or HUD. They testified that the present self-certification process used by the BIA does little to ensure that preference contracts go to legitimate firms. They also testified that those charged with on-site investigation of various construction projects often lack the knowledge adequate to carry out their task. Indeed, some cannot read or write.

The United Indian Development Association testified that two essential factors in any certification process are the determination of adverse control and affiliation. Adverse control may be exercised by a non-Indian company through control of: the finances of an Indian enterprise; equipment; sources of supplies; bonding; licensing and capital. The Association recommended requiring full disclosure of this information by all owners, officers and directors with more than a 5% interest in an Indian enterprise.

The recommendations for improving certification include: (1) verfying Indian ownership and management control; (2) establishing a single focal point within the Federal government for certifying Indian preference enterprises; (3) introducing sanctions, including criminal and civil penalties against indiviudals and firms that falsely certify themselves as Indian preference eligible; (4) include a termination clause in all future contracts for falsely certifying Indian preference status; (5) exclude foreign-owned firms operating in the United States from preference eligibility.

S. 321 seeks to strengthen Indian preference enforcement and certification in four ways. First, the bill creates an Office of Indian Preference Enforcement within the BIA, to enforce and administer Indian preference. Second, the Committee strictly defines the eligibility criteria for Indian preference firms to supplement enforcement. Third, the bill establishes a bond guarantee provision to provide Indian enterprises with needed access to capital. Finally, the bill imposes strict penalties on those who violate Indian preference laws. Enterprises must apply for certification if they wish to be eligible to receive preference contracts.

Office of Indian Preference Enforcement

S. 321 as introduced called for the creation of an "Advisory Committee on Indian Preference." The Advisory Committee, which would have consisted of representatives from various federal agencies and the Indian Community, had the responsibility for developing Indian preference enforcement and eligibility criteria.

The Committee heard concerns that the Advisory Committee lacked authority to carry out the tasks necessary to ensure the viability and effectiveness of Indian preference. On the other hand, the BIA cirticized the Advisory Committee proposal because it would not be only advisory in nature, since it was authorized to certify Indian preference enterprises.

The BIA testified that it preferred a federal compliance office as the most effective way to address the potential abuse of enforcement and compliance. According to the testimony of then Acting Assistant Secretary Ragsdale, "the key to the success of such an office would be the authority vested in it, and the dedication of that particular office to conscientiously inspect, investigate and close in on allegations that are supported by reasonable evidence."

Accordingly, the Committee has replaced the original Advisory Committee with an "Office of Indian Preference Enforcment" to be located within the BIA. The Office will have primary responsibility for enforcing and administering Indian preference law. The bill establishes an annual authorization of $500,000 for the Office to carry out its mission.

The Office will set the policy objectives, develop enforcement and eligibility criteria, certify as eligible qualifying Indian constractors, and manage the day-to-day administration of Indian preference laws. It will have the authority to: (1) investigate the financial backgrounds of the enterprises applying for certification, (2) audit the books of enterprises seeking certification, (3) investigate complaints alleging one or more violations of Buy Indian requirements, (4) investigate allegations that an Indian tribe is administering preferences in a way which is contrary to the intent of this Act. The Office will also work with the Office of Federal Procurement Policy to develop and publish a set of criteria for certifying the Indian enterprises as eligible for Indian preference contracts and develop and assist Federal agencies in implementing a program to ensure that Federal funds expended for the benefit of Indians also assist, to the maximum extent feasible, in the promotion of Indian economic development.

The kinds of allegations that the Office may investigate include, but are not limited to, claims that uncertified enterprises have received Indian preference awards, an enterprise has been wrongly certified or has misrepresented its status to the Office, or that an enterprise no longer meets the criteria necessary for Indian-preference certification.

The Committee views the Office as a key to the effective enforcement and administration of Indian preference programs. The BIA has only decertified two Indian preference enterprises in the past. A representative from HUD testified that he was not aware of any decertification made by that agency. Representatives of both agencies acknowledged that enforcement is inadequate.

The BIA's Chief of the Division of Contracting and Grants Administration testified to BIA's difficulty in investigating and decertifying front enterprises. For example, when a contracting officer became suspicious of a bid by a company which was revealed by the Special Committee to be a front, he arranged for the assistance of the Inspector General's office. Although the contracting officers remained suspicous, their investigation revealed no impropreties.

The Committee believes that had the BIA been vested with the authority that has been given to the Office, there is a much greater likelihood that such fronts would have been uncovered.

The sole responsibility of the Office will be Indian preference. It has been given the task of improving Indian preference enforcement and the means with which to do so. Subpoena power was deemed crucial to the ability of the Special Committee on Investigations to conduct a thorough investigation into Indian front organizations. Therefore, the Office has been granted similar authority. In addition, since the two previous decertifications by the BIA have been made only with the involvement of the Inspector General of the Department of the Interior, the Office and the Secretary of the Interior are each given the authority to request that the Inspector General investigate allegations of fraud in obtaining contracts awarded under the act.

The Office also has the important task of bringing consistency into the Indian preference arena. The overwhelmingly weight of testimony received by the Select Committee and the Special Committee discussed the necessity of consistency in Indian preference implementation.

Certification

In order to become eligible for Indian preference contracts, an enterprise must be certified by the Office of Indian Preference Enforcement. After being certified, an Indian preference enterprise may be granted an Indian preference contract only if it submits to the granting agency an affidavit certifying that the enterprise continues to meet all Indian preference requirements. The affidavit must be executed and submitted at the time of the grant bid or application, and again when the contract is awarded. A copy of the affidavit must also be submitted by the enterprise to any Indian tribe affected by the contract.

The Office may also decertify enterprises previously found to be eligible for Indian preference. Decertification may take place either if the Office determines that an enterprise was wrongly certified initially or if an enterprise no longer meets the eligibility criteria for Indian preference contracts.

Any decision to revoke certification may be appealed to the Office of Hearings and Appeals of the Department of the Interior (OHA). The action taken by OHA shall be considered final agency action, but is subject to judicial review.

Indian Owned Enterprise

The definition of an Indian-owned enterprise has fluctuated repeatedly since agencies began to actively use Buy Indian around 1963. The BIA originally defined preference-eligible enterprises as "substantialy" Indian-owned. Later, the standard was increased to 100 percent Indian-owned. Most recently, the BIA dcreased the percentage-of-ownership rquirement from 100 percent to 51 percent Indian-owned.

Under S. 321, an Indian-owned enterprise is defined as 51 percent or more Indian-owned except for construction firms, which must be 100 percent Indian-owned. The strict requirements for construction firms are necessary because the majority of 51 percent

Indian-owned construction firms have been unveiled as fronts. The prevalence of fronting provides evidence of the extreme difficulty in enforcing a mere 51 percent requirement. However, since the front problem has been much less prevalent for non-construction entities, the Committee believes a 51 percent requirement is sufficient. While Indian construction firms must receive 100 percent of the profits of the enterprise, non-construction firms must receive at least 51 percent.

The National Indian Contractor's Association testified in favor of the 100 percent requirement for construction. They argued that any less stringent requirement is an invitation to fronting. However, the Committee also received testimony that a 100 percent requirement is too burdensome if enterprise remain unable to obtain bonding. In addition, concern was expressed that the joint venture provisions of S. 321 as introduced were too restrictive. The bill prohibited joint ventures in the construction industry. It was argued that a strict 100 percent requirement could make developing needed expertise and creating new Indian construction enterprises extremely difficult.

The BIA testified that a 100 percent requirement denies businesses the opportunity to enter joint venture arrangements. They pointed out that one of the major problems Indian businesses face is undercapitalization and a lack of management expertise. Joint ventures can provide valuable opportunities for Indian enterprises that would otherwise have difficulty on their own.

In response, the Committee amended S. 321 at sec. 3(a)(9)(C) to allow joint ventures for construction firms, but only if they demonstrate that they can stand on their own. It requires an eligible Indian enterprise to obtain and successfully perform at least one contract independently prior to the award of an Indian preference contract to each joint venture in which the Indian enterprise is a party. This flexibility will both help Indian enterprises obtain access to needed assistance and help insure against fronts.

Several tribes also expresssed concern that S. 321 as introduced would have prevented them from hiring a non-Indian CEO to run tribally-owned businesses. The Committee concluded that the distinction between individually-owned Indian businesses and tribally-owned businesses provided adequate grounds to limit the Indian management requirement to individually-owned businesses.

In the case of individual businesses, the government's policy is to support the development of entrepreneurship within reservation communities. Allowing Indian owners/managers to hire non-Indian CEO/managers would conflict with this policy and leave open opportunities for fronts. In contrast, the government's policy goal in supporting tribally-owned business development is to support private job creation within reservations. It envisions large, labor intensive manufacturing and industrial enterprises which require highly trained and skilled managers.

Important skills are often unavailable within the reservation labor force, thereby necessitating the hiring of a non-Indian CEO/manager by an Indian tribe. Federal policy should allow this practice while simultaneously supporting and encouraging the training and development of Indian managers. Tribal businesses are not as susceptible to fronts as are individually-owned/managed business-

es, since the benefits of these larger tribal enterprises are derived primarily from the employment opportunities they create. In addition, profits are the subject of open negotiation between the tribe, management contractors and/or joint ventures.

Implementation of bidding criteria

Each Federal agency and Indian tribe has its own procedures and rules governing the implementation of Indian preference. The BIA generally uses its discretion to restrict bidding to qualified Indian bidders if at least two are available and interested in bidding. However, if fewer than two such enterprises are available, bidding opportunities are also provided to non-Indian firms. Other agencies limit bidding and provide preferences to the greatest extent feasible where funds are appropriated for the benefit of Indians.

Under S. 321, Federal agencies are required to limit competition for Buy Indian contract awards there is a reasonable expectation that: (1) offers will be obtained from at least 3 responsible architectural-engineering services or 2 offerors in the case of any contract and (2) the contract can be awarded at a fair and reasonable price. Agencies are also required, at the beginning of each fiscal year, to provide the Office of Indian Preference a list of Indian preference contracts under their jurisdiction.

The Committee anticipates that contracting agencies will use reasonable standards to determine whether the requisite number of responsible offerors is available. However, in the event that only one offer is received for contracts other than those for architectural-engineering services, the procuring agency may negotiate a price with the bidder. This ability is essential to minimizing the additional cost to the Federal government of limiting bids to Indian enterprises. Each Federal agency must advertise Indian contracts sufficiently far in advance to permit a subsequent open market advertisement of the contract if the contract cannot be awarded under limited competition.

If it is not feasible for an agency to limit competition, it may award the contract after full and open competition. Such a contract shall be awarded to the Indian preference enterprise submitting the lowest bid that does not exceed that of the low-bidding non-Indian enterprise by between 5 and 10 percent. Bids are to be let under open competition only if the contracting agency determines that there are not at least two qualified Indian firms—three for architectural and engineering services—ready to participate.

The BIA advocated using open competition as the preferred method for contracts in excess of $25,000 in the belief that it would provide a more adequate means of determining the market price for the services or products involved, as well as provide preference to Indian firms. However, the Committee believes this would allow better-financed firms to "low-ball" their bids in order to obtain preference contracts, leaving smaller, under-capitalized Indian-owned enterprises open to unfair competition.

Upon the request of any Federal agency, the Secretary of the Interior may authorize Indian contracting preferences if the proposed procurement contracts do not involve funds appropriated for the benefit of Indians and would thus be automatically available for

such preference. The Secretary may grant such a request after making a determination that the preference will help further the goals of Indian preference.

This act does not apply to the awarding of contracts under the Indian Self-Determination and Assistance Act, contracts for the procurement of expert advice and testimony in litigation conducted by the United States as trustee for Indians or Indian tribes, or contracts awarded under section 8(a) of the Small Business Act. However, the provisions do apply to the awarding of subcontracts and employment and training opportunities under Self-Determination.

The preference requirements of the Act may be waived only under extraordinary circumstances. Such circumstances may include where there is an overriding national interest or if a contract is so sensitive in nature as to merit special consideration—the IHS health care mission is one example. However, a determination to waive the requirements may only be made by a high-ranking Federal official, including the Assistant Secretary of the Interior for Indian Affairs, the Director of the Indian Health Service, and other senior procurement officers with ranks comparable to that of assistant secretary.

Tribal Enforcement

Many Indian tribes have established their own entities to ensure that section 7(b) is property complied with by contractors or others who do business within the confines of an Indian reservation. These Tribal Employment Rights Organizations (TEROs) are arms of the tribal government with a responsibility to ensure the maximum utilization of Indian workers and companies in all economic activities occurring on a reservation. TEROs act as the reservation equivalent of the Office of Indian Preference Enforcement.

As has been the problem with Federal agencies, TEROs often have differing eligibility criteria for Indian preference. The resulting confusion has hindered the effectiveness of Indian preference laws. S. 321 both consolidates existing Indian preference laws and continues the involvement of TEROs in Indian preference administration and enforcement with important changes.

A tribe that establishes sufficient preference requirements may utilize those criteria for a preference contract or grant to be performed on the reservation. Preference requirements of an Indian tribe must be generally comparable to those administered by the Office of Indian Preference Enforcement. In addition, the tribe must have established a tribal office to enforce Indian preferences and submitted to the Director of the Office a written request to administer tribal preference in lieu of the Office. The tribe must submit to the Director a statement certifying that the tribal office will administer its preference in accordance with federal law.

The Committee has received testimony regarding certain isolated instances where a TERO has either abused its authority or failed to adequately police against fronting. Therefore, if the Director determines that the preferences established by a tribe are not generally comparable to federal law, that the tribe is incapable of enforcing those preferences, or that a tribe is inadequately or improperly administering Indian preference laws, the Director may deny or revoke the ability of a tribe to administer Indian preference laws.

Penalties

The substitute amendment to S. 321 also provides civil and criminal penalties for any party who misrepresents the status of an individual as an Indian, or of an enterprise as an Indian enterprise, in order to obtain a preference, including suspension and debarment. In addition, the party may be subjected to a criminal action brought in a tribal court of an affected Indian tribe, and a fine of not more than $5,000 and/or imprisonment for not more than one year.

Regulations

The Office of Indian Preference Enforcement, in cooperation with the Office of Federal Procurement Policy, is responsible for drafting regulations which may be used government-wide. The Committee views a consistent regulatory environment as essential to the effectiveness of Indian preference.

The Small Business Administration expressed its concern that S. 321 may have afforded Indian-owned concerns preferential treatment within SBA's minority small business program (Section 8(a)). The Committee has alleviated SBA's concern by incorporating language into Section 3(a)(4)(D) of the substitute to guard against such treatment.

FINANCING AND BONDING PROVISIONS

Federal acquisition regulations require contractors to obtain bonds in order to be eligible to perform construction contracts. However, the difficulty many Indian firms have obtaining bonding often forces them to choose between losing an opportunity to bid or seeking alternative financial backing. The inability of fledgling Indian enterprises to bond is an open invitation to fronts.

The Committee received testimony that bonding is the key to any effort to eliminate fronts. However, Indian entrepreneurs often have difficulty obtaining bonds for a variety of reasons. They often lack experience and capital. They have little or no track-record at which to point. Surety companies are frequently wary of becoming involved in reservation environments—they are wary of possibly being required to go through the tribal court system in order to repossess, and do not believe they can attach effectively any equipment while it is on the reservation.

The Small Business Administration Guaranteed Bond Program is among the few resources available to help Indian and other small business entrepreneurs obtain financing to which they would not otherwise have access. However, guarantees are often difficult to obtain either because SBA's program reaches its guarantee ceiling very early in each fiscal year or because SBA determines that a guarantee would result in too great a financial risk.

One witness testified that he was forced to seek other avenues of financial backing when SBA refused to supply him with a guarantee. A year and a half after starting his business, the witness approached SBA and was told his company did not have enough experience, and that he did not have enough money in the bank to qualify for a bond. He was told to come back to SBA in two years, after he had developed a track record. When he returned three

years later, he was informed by SBA that he was too successful for the program.

A bond guarantee program sufficient to overcome the financial obstacles faced by Indian businesses is essential. While such a program should not issue guarantees that pose an excessive risk, it must not be overly restrictive. Bond guarantees are necessary precisely because companies may not yet have a track record or sufficient assets to receive a bond on their own. Guarantees act as an inducement for corporate sureties to incur the risk of bonding those starting a business.

The Committee acknowledges the necessity of businesses growing slowly, and does not advocate providing substantial guarantees to businesses without the capacity to perform contracts. However, the Committee wishes to insure that bond guarantees will be available to a degree adequate to protect against fronting. The nature of a bond guarantee program is to incur risks that corporate sureties are otherwise unwilling to bear. Testimony received by the Committee uniformly discussed the need to address the bonding issue, especially if construction firms are subjected to a 100 percent ownership requirement.

Therefore, the bill establishes two entities to help Indian enterprises obtain financial backing: a bond guarantee program and an Indian Enterprise Opportunity Fund.

Indian Enterprise Opportunity Fund

The bill creates an Indian Enterprise Opportunity Fund to back up bond guarantees. The Fund is to receive an amount equal to 1.5 percent of the dollar value each Indian preference contract, plus such sums as may be appropriated by Congress. No funds are to be deducted from contracts if the fund balance exceeds $100,000,000 at the close of the preceding fiscal year.

The purpose of the Fund is to insulate the Federal government from any losses incurred through defaults. The fund is paid for by the contractors themselves. However, this does not preclude Congress from appropriating funds should they be needed.

The Secretary of the Treasury is required to submit an annual report on the financial condition of the Fund, and with five-year projections of its expected performance. The Secretary will invest whatever portion of the Fund the Secretary determines is not necessary to meet current withdrawals in interest-bearing obligations of the United States, the interest on which shall be credited to the Fund.

Bond Guarantee

The bond guarantee provision is modeled after a similar program administered by the Small Business Administration. However, unlike the SBA program, the Secretary of the Interior will reimburse the SBA fund in the event of a default.

The fund will be administered by the Secretary of the Interior. SBA will be responsible for issuing guarantees, which will be backed by the Secretary of the Interior. In the event of a default, Interior will then transfer to SBA's bond guarantee fund an amount sufficient to cover SBA's loss due to the guarantee.

In order to obtain a guarantee, contractors must first approach a surety bond company. If the company is willing to provide a bond subject to a government guarantee, it will then contact SBA. If SBA believes the Indian preference enterprise is reliable and is reasonably capable of completing the contract, the Secretary of the Interior will enter into an obligation to reimburse SBA in the event of a default. A guarantee may then be issued.

Funds are only transferred from the Fund to SBA in the event of a default. Until such time as SBA informs the Office of a default, monies will remain in the Fund. The Office is obligated to reimburse SBA for the cost it incurs in paying the price of any guarantee.

The Committee anticipates that the Secretary will issue guarantees with a total face value in excess of the amount of the monies available in the Fund. Since reimbursements from the Fund are only required in the event of a default, the Committee believes that the Fund should be administered in a way that guarantees a total value of bonds well in excess of the monies available in the Fund.

Because the Fund will begin with a zero balance, the Committee has included a provision enabling the Secretary to begin to guarantee bonds prior to the Fund attaining a large balance. Until the end of the first full fiscal year after enactment, the Secretary is to make reimbursement guarantees totaling no more than $15 million on bond amounts for which there would otherwise be insufficient funds available. The maximum guarantee amount available is 90 percent of $3 million.

Miller Act Waivers

S. 321 provides for a waiver of bonding requirements if: (1) the award price of the contract is $3 million or less, (2) the enterprise has been determined to be responsible and capable of performing the contract; (3) the enterprise has been certified by the Office of Indian Preference; and (4) the enterprise, after good faith effort, has been rejected by at least two surety firms. An enterprise must also protect persons furnishing materials and labor, in lieu of a payment bond through a program of direct disbursement by the Federal government of payments due to those persons. This may be accomplished either through an escrow account established and maintained by the enterprise at any Federal Deposit Insurance Corporation-insured bank, or a Federal government payment center servicing the procuring agency.

The Committee believes that any such waiver will seldom be granted, since the contracting agency will not be reimbursed for a default. However, the Committee encourages contracting agencies to utilize this waiver authority whenever appropriate.

LEGISLATIVE HISTORY

Legislation to amend the Buy Indian Act and section 7(b) of the Indian Self-Determination Act was introduced on January 31, 1989 by Senator Inouye, for himself and Senators McCain, Burdick, Conrad and Cochran and was referred to the Select Committee on Indian Affairs. A hearing was held before the Select Committee on Indian Affairs on May 11, 1989. Additional testimony was received

by the Special Committee on Investigations during a series of hearings held between January 31, 1989 and February 27, 1989. An amendment in the nature of a substitute to S. 321, offered by Senators Conrad, McCain, DeConcini and Inouye was considered and ordered reported by the Select Committee on Indian Affairs on September 15, 1989.

COMMITTEE RECOMMENDATION

The Select Committee on Indian Affairs, in open business session on September 15, 1989, by unanimous consent and with a quorum present, recommends that the Senate do pass S. 321.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 cites the short title of the Act as the "Indian Preference Act of 1989."

Section 2

Section 2 sets forth the findings of the Congress. In subsection (b) of this section Congress declares that a major goal of the United States is to ensure that the procurement of goods and services for the benefit of Indians shall be carried out in manner that achieves the maximum benefit for Indian employment and economic development.

Section 3

Subsection (a)

Section 3 amends the Buy Indian Act which is located in Section 23 of the Act of June 25, 1910. Subsection (a) paragraph (1) of the Act provides that each Federal agency which administers funds which have been appropriated for the benefit of Indians shall provide a preference to eligible Indian enterprises in the award of a contract or grant.

Subparagraph (B) of this paragraph provides that the Federal agency shall require the recipient of the contract or grant to provide training and employment preferences for Indians. This requirement is also placed on the recipient of a subcontract or subgrant under such contract. Finally, the recipent of a contract or grant must provide a preference to an Indian Preference Enterprise for the award of any subcontract or subgrant under the contract or grant.

Paragraph (2) of this subsection provides that the Secretary may authorize preferences for Indian Preference Enterprises in the award of any contract by a Federal agency that does not involve funds appropriated for the benefit of Indians when requested by that Federal agency if the preferences will help fulfill his special responsibilities towards Indians.

Paragraph (3) of this subsection provides that these preferences shall have priority over all other Federal procurement practices.

Paragraph (4) of this subsection defines contracts or grants whose funds are appropriated for the benefit of Indians as those contracts where Indans are the primary beneficiaries of said con-

tract, where the majority of the activity to be performed in the contract takes place on an Indian reservation, and where the contract is entered into under the Johnson-O'Malley Act or under the United States Housing Act of 1937.

Subparagraph (B) of this subsection provides that this section shall not apply to the award of contracts under the Indian Self-Determination and Education Assistance Act but shall apply to the award of subcontracts under such contracts and to employment and training opportunities under such contracts.

Subparagraph (C) of this subsection excludes contracts for the procurement of expert assistance and testimony in litigation by the U.S. as trustee for Indians or Indian tribes from these provisions.

Subparagraph (D) of this subsection excludes contracts awarded under section 8(a) of the Small Business Act from the provisions of this Act.

Subparagraph (E) of this subsection makes this act applicable to the Five Civilized Tribes and the members of the Osage Tribe.

Paragraph (5) of this subsection provides that preferences under this Act shall be implemented by limiting competition for the award of a contract or grant to only Indian Preference Enterprises where there is a reasonable expectation that there will be at least 3 responsible bids for architectural-engineering contracts or 2 responsible bids for the procurement of any other services or any product and where the contract can be awarded at a fair and reasonable price. This paragraph also provides that if only one offer is received under the limited competition provisions of this subsection for a contract other than architectural-engineering services the procuring agency may negotiate a contract award at a fair and reasonable price.

Paragraph (6) of this subsection provides that if it is not feasible for a Federal agency to limit competition as provided for in this section, the agency shall award the contract after full and open competition. An Indian Preference Enterprise shall be awarded a contract if it submits the lowest bid that does not exceed the lowest bid of any non-preference enterprise by a percentage to be prescribed by that Federal agency. This percentage shall not be less than 5 percent nor more than 10 percent. This paragraph also provides that if a factor other than price is determinative of a contract award, the agency shall develop and utilize a comparable method for the application of Indian preference.

Paragraph (7) of this subsection provides that the preference requirements of this section may be waived only upon extraordinary circumstances. The Assistant Secretary of Indian Affairs shall have the authority to make this determination for contracts within the Department of the Interior, for the Department of Health and Human Services the Director of the Indian Health Services shall have the authority, in all other cases the senior procurement executive or the principal deputy in the procuring agency shall have the authority consistent with the Federal Procurement Act.

Paragraph (8) of this subsection provides that each Federal agency subject to this Act shall provide a list of the Indian preference contracts to the Office of Indian Preference at the beginning of each fiscal year. It further provides that each Federal agency shall advertise Indian preference contracts sufficiently in advance

of the date performance must begin in order to provide for the subsequent open market advertisement of the contract if it cannot be awarded under the limited competition of this subsection.

Paragraph (9) of this subsection states that only Indian Preference Enterprises as defined in this section shall be eligible for the preferences established by this Act. In order to be eligible for the preferences under this Act, the enterprise must provide an affidavit certifying that the enterprise meets the requirements of the Act and has been certified by the Office of Indian Preference as an Indian Preference Enterprise to the procuring agency. The affidavit shall be executed at the time of the bid and again at the time that the contract is awarded. A copy of the affidavit shall be provided to the Indian Tribe affected by the contract.

Subparagraph (C) of this subsection provides that an Indian preference enterprise engaged in construction activities may enter into a joint venture with non-preference enterprises if the Indian preference enterprise has successfully completed at least one contract independently. Both the Indian preference enterprise and the joint ventures shall remain eligible for the preferences under this Act if the Indian preference enterprise owns and controls at least 51 percent of the joint venture, receives at least 51 percent of the profits from the joint venture and has successfully completed at least one contract independently for each preference contract awarded to the joint venture.

Subsection (b)

Subsection (b) sets out the definitions of this section. In order to be defined as an Indian Preference Enterprise an enterprise which is engaged in construction must be entirely owned by Indians or Indian Tribes who receive 100 percent of the profits. For those enterprises not engaged in construction it must be owned by an Indian Tribe that receives not less than 51 percent of the profits or if it is owned by individual Indians they must own a 51 percent interest of the enterprise and receive not less than 51 percent of the profits and the enterprise must have an Indian owner who acts as the Chief Executive Officer of the enterprise.

Subsection (c)

Under subsection (c) there is created an Office of Indian Preference which shall be located within the Department of the Interior. The Director of the Office of Indian Preference shall be appointed by the Assistant Secretary of Indian Affairs.

Paragraph (3) of this subsection sets out the duties and the authority of the Director of the Office of Indian Preference. These duties include developing criteria for certification, investigating the financial backgrounds of enterprises, certifying Indian Preference Enterprises, prescribing regulations and establishing policies and enforcement systems in conjunction with the Office of Federal Procurement Policy, and investigating complaints alleging violations under this section.

Subparagraph (B) of this subsection describes the regulations to be prescribed by the Director of the Office of Indian Preference. These regulations shall include a standard application for certification as an Indian Preference Enterprise, procedures for the process-

ing of the completed applications for certification by the Director, appeal procedures for enterprises which are denied certification by the Director and a description of the recordkeeping system of the Office. Subparagraph (C) provides that these regulations shall be prescribed in conjunction with the Office of Federal Procurement Policy in a manner that promotes maximum consistency, uniformity and coordination among Federal agencies and maximum participation of the Indian Tribes.

Paragraph (4) of this subsection provides that the Director shall employ staff for the Office and can utilize experts as necessary to carry out his duties. The Director or any employee of the Office shall not participate in any decision which involves an enterprise in which that person or any relative of such person has a financial interest.

Paragraph (5) of this subsection provides that the Director has the authority to administer oaths or affirmations, subpoena witnesses, require the production of evidence for the purpose of conducting an investigation under this section. If any person fails to comply with a subpoena issued by the Director, a court may issue an order requiring such person to appear before the Director and produce the evidence requested. A failure to obey such an order of the court shall be punishable as a contempt thereof. Witnesses subpoenaed by the Director shall be compensated the same as witnesses in the courts of the United States.

Paragraph (6) of this subsection provides that all statements made by an enterprise to the Office of Indian Preference shall be made under an oath or affirmation by an officer or owner of the enterprise.

Paragraph (7) of this subsection provides that if the Director determines that an non-certified enterprise was given a preference under this section and was awarded an Indian preference contract, or that an enterprise was wrongly certified as an Indian Preference Enterprise, or an enterprise misrepresented its status to the Office, or an enterprise is no longer in compliance with the ownership requirements of this Act, then the Director shall revoke the certification of the enterprise and transmit all available information to the Inspector General of, or the head of, the agency administering the contract.

Paragraph (8) of this subsection states that any decision of the Director to deny certification of an enterprise or to revoke the certification of an enterprise may be appealed to the Office of Hearings and Appeals in the Department of Interior. The decision of the Office of Hearings and Appeals shall be considered final agency action and is subject to judicial review under chapter 7 of title 5 of the U.S.C.

Paragraph (9) of this subsection authorizes the Congress to appropriate $500,000 annually to carry out the provisions of this Act.

Subsection (d)

Paragraph (1) of this subsection provides for the creation of the Indian Enterprise Opportunity Fund pursuant to the Small Business Investment Act of 1958. Each Federal agency shall deduct an amount equal to 1.5 percent of the total payment from each payment made under an Indian Preference contract to an Indian Pref-

erence Enterprise which shall be deposited in the Fund. The total amount of the Fund shall not exceed $100,000,000 and no funds shall be deducted if at the close of the fiscal year the total amount of the Fund exceeds $40,000,000.

Paragraph (2) of this subsection provides that the provisions of the Miller Act of August 24, 1935 shall not apply to a contract awarded by a Federal agency to an Indian Preference Enterprise if the contract price is anticipated to be $3,000,000 or less; the Indian Preference Enterprise is determined to be a responsible contractor capable of performing the contract, the Federal agency has determined that the Indian Preference Enterprise has been unable to obtain the requisite bonds after making at least two good faith applications to surety firms determined by the Secretary of the Treasury to issue acceptable bonds pursuant to Chapter 93 of title 31 of the U.S.C.; and the Indian Preference Enterprise has provided for the protection of persons furnishing materials and labor, in lieu of a payment bond, by providing direct disbursement of payments from the Federal Government to such persons through an escrow account or through a Federal Government payment center of a procuring agency.

Subsection (e)

Paragraph (1) of this subsection provides that an Indian Tribe's preference requirements shall apply to an Indian Preference Contract in lieu of the preferences provided under this section and the Indian tribe shall have the primary responsibility for enforcing the preferences if the following conditions apply: the Indian Preference contract or grant is to be performed on an Indian reservation; the Indian Tribe has preferences generally comparable to those provided by this section; the Indian Tribe has an office to enforce those preferences; the Indian Tribe has submitted a written request to the Director for primary enforcement responsibility; and the tribal office submits a statement certifying that the tribal office will administer these preferences in accordance with this section to the Director.

Paragraph (2) of this subsection provides that the Indian tribal office shall not have primary enforcement responsibility where the Director determines that the tribal preferences are not generally comparable to those provided under this section, or that the tribal office is not capable of enforcing the preferences, or the tribal office is failing to meet its responsibilities to the extent that the rights of Indians or Indian Preference Enterprises are being seriously jeopardized.

Subsection (f)

Subsection (f) provides that an individual who misrepresents their status or the status of an enterprise in order to obtain a preference under this section for such person or any other person may be punished in a criminal action in the tribal court of the Indian Tribe affected by the misrepresentation by a fine of not more than $5,000 or by imprisonment for not more than one year or both, such person shall be liable to the United States for the amount of any grant or the amount of money paid under the preference contract, shall be subject to disbarment and suspension under subpart

9.4 of part 9 of title 48 of the C.F.R., and shall be ineligible for any preference under this section.

Subsection (g)

Subsection (g) provides that the Secretary of the Interior or the Director of the Office of Indian Preference may request the Inspector General of the Department of Interior to conduct an investigation of any contract or grant subject to the provisions of this subsection. The Inspector General shall make a written report within 30 days from the date of the original request detailing the actions, if any, the Inspector General will take with respect to the request.

Section 4

Section (4) amends Chapter 53 of Title 18 of the U.S.C. adding a new section, titled 1169 Indian Preferences, which provides for criminal penalties for violations of this Act.

Subsection (a)

Under subsection (a) of this section, any person who for the purpose of obtaining a preference under this Act makes, passes, utters or publishes any statement knowing that it is false or any instrument, paper or document knowing it to have been forged, altered or counterfeited shall be fined not more than $100,000 or imprisoned not more than 5 years or both.

Subsection (b)

Under subsection (b) of this section any person who knowingly makes a false statement or representation, or knowingly conceals or fails to disclose any fact which is required under the Buy Indian Act or is necessary to verify or clarify the eligibility of an enterprise or individual for the preferences of such section.

Section 5

Subsection (a)

Under this subsection the Small Business Investment Act of 1958 is amended to establish a separate Small Business Administration Surety Bond Guarantee for Indian Preference Enterprises. This guarantee shall not exceed 95 percent of the loss incurred. The 95 percent Surety Bond guarantee shall apply to those bonds issued with the specific approval of S.B.A., the total amount of the bond shall not exceed $5,000,000 and there must be sufficient funds in the Indian Enterprise Opportunity Fund at the time the bond is executed to cover such loss. During the first year of this Act the Small Business Administration may guarantee up to $15,000,000 without sufficient funds in the Indian Enterprise Opportunity Fund to cover the potential loss.

Subsection (b)

Under this subsection the Small Business Investment Act of 1958 is further amended to provide that the S.B.A. may guarantee or enter into agreements to guarantee any surety against loss resulting from breach of the terms of a bid bond, performance bond, or payment bond by a principal on any contract of up to $5,000,000 if

the principal is an Indian Preference Enterprise, or $1,250,000 for any other principal.

Subsection (c)

Under this subsection the Small Business Investment Act of 1958 is amended to provide for the establishment of the Indian Enterprise Opportunity Fund which shall be a revolving fund located within the Treasury of the United States. The Administrator of the Small Business Administration shall submit an annual report to the Senate Select Committee on Indian Affairs and to the House Committee on Interior and Insular Affairs on the financial condition of the Fund and results of the operations of the Fund the past fiscal year as well as the projections for the current fical year and the next 5 fiscal years. It further provides that the Secretary of the Treasury may invest any portion of the fund, in interest-bearing accounts only, which is not required in the judgment of the Administrator to meet current withdrawals. Any obligation acquired by the Fund may be sold by the Secretary of the Treasury at the market price and any interest on or proceeds from the sale of such obligations shall be credited to and form part of the Opportunity Fund. Funds in the Opportunity Fund shall be available to the Administrator without fiscal year limitation to pay only surety obligations under the guarantee provisions of this Act and to compensate any Federal agency for damages incurred pursuant to the default of an Indian Preference Enterprise under provisions of this Act that allow for waivers of the Miller Act.

Section 6

Section (6) provides membership provision for the Osage Tribe until such time as the Tribe develops its own criteria for membership. These provisions shall not alter or change in any way the rights of the Tribe or the rights of its members in the mineral estate.

Section 7

Section (7) authorizes the Secretaty of the Interior to negotiate and enter into cooperative agreements with Indian Tribes for manpower and job-training programs which shall include work on lands owned by the Department of the Interior. As part of these agreements the Secretary is authorized to advance or reimburse funds to Indian Tribes for furnishing or sharing equipment, supplies or facilities without regard to title 31 of the U.S.C.

COST AND BUDGETARY CONSIDERATIONS

The cost estimates for S. 321 as provided by the Congressional Budget Office are outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 20, 1989.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

Dear MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 321, the Indian Preference Act of 1989.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE

1. Bill number: S. 321.

2. Bill title: Indian Preference Act of 1989.

3. Bill status: As reported by the Senate Select Committee on Indian Affairs, September 15, 1989.

4. Bill purpose: S. 321 would amend existing laws requiring the federal government to give preference to Indian enterprises in awarding contracts in federal programs that benefit Indians. Under existing "Buy Indian" provisions, the Secretary of the Interior already has broad discretion to purchase Indian goods and services. However, implementation of the current law has largely been determined by agency policy and regulations. This bill would require Indian preference for all agencies administering contracts or grants for the benefit of Indians and would establish procedures and guidelines for letting contracts, identifying eligible Indian enterprises, and detecting abuse.

S. 321 would establish an Office of Indian Preference within the Department of the Interior (DOI) to implement and monitor the certification of Indian enterprises. Eligible firms would have to be 100 percent Indian-owned in the case of construction firms and at least 51 percent Indian-owned in the case of non-construction firms. A federal agency would be permitted to accept bids from Indian firms that exceed the lowest bid by a percentage (up to 10 percent) set by the agency head. Finally, S. 321 would expand the Small Business Administration's (SBA) surety bond guarantee program for Indian enterprises, by increasing the maximum amount that could be guaranteed for an Indian firm from $1.25 million to $5 million. An Indian Enterprise Opportunity Fund would be created within DOI to reimburse SBA for losses from these additional guarantees.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1990	1991	1992	1993	1994
Office of Indian Preference:					
Authorization level	0.5	0.5	0.5	0.5	0.5
Estimated outlays	.4	.5	.5	.5	.5

[By fiscal year, in millions of dollars]

	1990	1991	1992	1993	1994
Bond guarantee program:					
Estimated authorization level	−.1	−.1	.1	.1	.1
Estimated outlays	−.1	−.1	.1	.1	.1
Total:					
Estimated authorization level	.4	.4	.6	.6	.6
Estimated outlays	.3	.4	.6	.6	.6

The costs of this bill fall within budget function 450.

Basis of estimate: S. 321 would authorize the appropriation of $500,000 per year for the Office of Indian Preference. This estimate assumes that the full amount authorized would be appropriated, beginning in fiscal year 1990.

We estimate that strengthening and clarifying the current "Buy Indian" law would result in no significant cost to the federal government. This bill would not significantly change current procurement practices with respect to Indian enterprises. To the extent that it encourages more enthusiastic application of the law, and to the extent that Indian firms' costs exceed those of the lowest bidders, S. 321 could result in higher costs on some federal contracts. There is no clear basis for estimating such costs, but they are not likely to be significant.

Expansion of SBA's surety bond guarantee program for Indian firms would result in net outlays of less than $200,000 between 1990 and 1994. The losses on surety bonds would be offset partially by premiums collected from Indian firms and surety companies participating in the program. The mandatory contribution of 1.5 percent of contract costs to fund this program would provide about $5 million per year to capitalize the Indian Enterprise Opportunity Fund. (On the other hand, the costs of individual contracts would probably rise, to compensate for the 1.5 percent contribution.) If there were no change in appropriations levels, outlays would be reduced, as money that would have been spent on contracts would be held to cover the losses from the guarantee program. However, it is not possible to determine whether these savings would be realized in practice, as there is no way to predict whether or not funding levels for the affected programs would be increased.

The creation of the Indian Enterprise Opportunity Fund would allow DOI to reimburse SBA for losses in this program. This would be an intragovernmental transaction, however, which would not affect estimated authorization levels or outlays under the program.

6. Estimated cost to state and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Marta Morgan (226–2860)

10. Estimate approved by: C.G. Nuckols for James L. Blum, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the

regulatory and paperwork impact that would be incurred in carrying out the provisions of the bill.

The Committee believes that S. 321 will have a minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee received the following testimony from the Department of the Interior stating the position of the Administration on S. 321 as introduced.

STATEMENT OF WILLIAM P. RAGSDALE, ACTING ASSISTANT SECRETARY INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Committee, I am pleased to present the views of the Department of the Interior on S. 321, the "Buy Indian Act Amendments of 1989".

We recommend enactment of S. 321 with the amendments described in this statement.

We note that the Justice Department, which is not testifying here today, would oppose enactment of this bill unless two additional amendments are made. The first concerns the hiring of expert consultants and witnesses by the United States for use in natural resource litigation undertaken by the United States, pursuant to its trust responsibility, for the benefit of Indian tribes or individuals. The second concern relates to the constitutionality of section 23(f)(2)(G) of the bill, which imposes restrictions on the Secretary of Interior's appointment of members to the "Advisory Committee on Indian Preference." We defer to the Department of Justice on these issues.

Contracting with Indian economic enterprises represents one way that the Federal Government can help alleviate the wide spread unemployment and under employment that is common to many Indian reservations. The Act of June 25, 1910, which is commonly referred to as the Buy Indian Act, is one of the vehicles that can be used to help improve this deplorable situation. However, the original purpose of this law is somewhat difficult to discern. As a consequence, modern legislation that inarguably expresses the will of Congress and takes into consideration the situation that exists today, not the situation that may have existed in 1910 is needed. For this reason, S. 321, if amended as we suggest, could fulfill this need.

Background

S. 321 includes an extensive revision of the so called Buy Indian Act which is codified in 25 U.S.C. 47 as follows:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

Similar provisions appeared in appropriations acts as early as 1886 but were not made permanent until the Act of April 30, 1908 (35 Stat. at 71) and the Act of June 25, 1910 (36 Stat. at 861). The

provision also applies to the Indian Health Service under the provision codified in 42 U.S.C. 2001(a).

A companion provision (which is not amended by S. 321 and which does not apply to the Indian Health Service) was enacted in section 11 of the Indian Financing Act Amendments of 1984 and is codified in 25 U.S.C. 47a. It provides:

> The Secretary [of the Interior], in his discretion, may require security other than bonds required by the Miller Act (40 U.S.C. 270a) when entering into a contract with an Indian-owned economic enterprise pursuant to the provisions of the Act of June 25, 1910 (25 U.S.C. 47), for the construction, alternation, or repair of any public work of the United States: *Provided,* That, the alternative form of security provides the United States with adequate security for performance and payment.

Although the Buy Indian Act authority was not used extensively until 1963, the Bureau of Indian Affairs now contracts extensively with Indian organizations. However, since 1975 our most significant authority for such contracting is the Indian Self-Determination Act under which we entered into contracts with tribal organizations valued at some $376 million in fiscal year 1988.

Under a provision in the Bureau of Indian Affairs Manual, the BIA is required to contract under the Buy Indian Act (in cases where a tribe has not invoked the Indian Self-Determinatin Act) unless an Indian firm is not available or a waiver is granted by the Assistant Secretary for Indian Affairs. Under the Buy Indian Act that year we entered into 179 contracts with Indian firms totaling over $54 million. Our contracts with non-indian firms in fiscal year 1988 totaled about $58 million. Also in fiscal year 1988, we had some 51,000 minor transactions (i.e., less than $25,000 each) totaling over $75 million but we have no breakdown of those transaction as to Indian and other.

Most of the fiscal year 1988 Buy Indian Act contract dollars ($38 million under 63 contracts) were for the construction of roads and bridges and the others were for a variety of services ranging from architectural and engineering design to trash collection.

Consolidating Another Buy Indian Act

Section 23(b)(1) of the Buy Indian Act as revised by section 3 of S. 321 restates (but the bill does not repeal) with minor changes the provision codified in 25 U.S.C. 450e(b) which provides:

> Any contract, subcontract, grant, or subgrant pursuant to this [Indian Self-Determination and Education Assistance] Act, the Act of April 16, 1934 * * * *or any other Act authorizing contracts with or grants to Indian organizations or for the benefit of Indians,* shall require that to the greatest extent feasible—
>
> (1) preference and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and
>
> (2) preference in the award of subcontracts and subgrants in connection with the administration of such

contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 [25 U.S.C. 1452].

Indian Employment by Indian Contractors

Section 2(b)(1) of S. 321 declares "a major national goal" of ensuring that "the procurement of goods and services on Indian reservations or otherwise for the benefit of Indians shall be carried out in a manner that achieves the maximum benefit for Indian employment and business development". However, it may not be clear that the Indian employment, training, and subcontracting preference requirements of section 23(b) apply in all cases to the carrying out by an Indian firm of a contract let under the Buy Indian Act. Therefore, to avoid any dispute we recommend that in section 23(b)(1) of the restated Buy Indian Act on page 3, line 21 the words "this Act," be inserted after "provided under".

Tribal Employment and Contracting Preference Laws

Section 23(b)(2) provides for tribal enforcement of a tribe's "subcontracting and employment preference requirements" in lieu of "the preferences established by the Federal agency". We believe that such a provision is consistent with the Supreme Court's decision in *U.S.* v. *Mazurie,* 419 US 544 (1975) upholding a delegation by the Congress to tribes of a portion of the Congress' constitutional authority to regulate commerce with tribes.

To make it clear that the reference to tribal "subcontracting * * * requirements" does not include requiring a contractor to subcontract or any activities other than the selection of a subcontractor, we recommend that on page 4, lines 20 and 24 the word "subcontracting" be stricken and replaced by "subcontractor selection" in both instances.

To be correct, we recommend that on page 4, lines 22 and 23 the phrase "the preferences established by the Federal agency" be stricken and replaced by "the preferences established under this section".

We also note in section 23(b)(2) on page 4, lines 15 and 16 language requiring a determination whether a tribe has imposed preferences "generally comparable" to those imposed by "this subsection". On page 5, lines 4 and 5 the reference is to a determination that a tribe has imposed a preference "generally comparable" to those under "this section". In both instances we believe that the intent is to refer to "this section" and page 4, line 16 should be amended accordingly.

The definition for the term "Indian controlled enterprises on page 8, lines 18 through 23, may be too restrictive. Therefore, we suggest the definition be amended to read as follows:

> Indian Economic Enterprise means any business entity (whether organized for profit or not) which: (1) is at least 51 percent owned by one or more Indian(s) or (an) Indian Tribe(s); and (2) for non-tribal ownership, has one or more of its Indian owners involved in daily business manage-

ment of the economic enterprise; and (3) has the majority of its earnings accrue to such Indian person(s) if organized for profit. These requirements must exist: when an offer is made in response to a solicitation; at the time of contract award; and, during the full term of the contract. For not-for-profit enterprises, the majority of the board of directors (or other controlling body) must be Indian persons.

Finally, we recommend the addition of a definition of the term "products of Indian industry", to make it clear that the term includes anything which Indian industry may produce, either now or in the future. We recommend the following definition be added to the bill:

> The term "products of Indian industry" shall be interpreted broadly, so as to include anything which Indian industry now or in the future may produce, including supplies, services, construction, and intellectual property.

Other Concerns

We believe that section 23(c)(2) on page 5 is not clear as to whether authorization by the Secretary of the Interior is required for each use by other Federal agencies of the preference authorized in section 23(c)(1) or only those under section 23(c)(3)(A). An analysis of the bill which we have received interprets the provision as discretionary authority applying to contracts not subject to the mandatory requirements of section 23(c)(1) but such an interpretation is not in line with the bill language. In any event we do not see the need for such authority being given to the Secretary of the Interior as to contracting by other Federal agencies but we defer to the Office of Federal Procurement Policy as to whether that Office should have such authority since it is responsible for Government-wide procurement regulations. The provision should be deleted or revised.

In section 23(c)(3) on page 6, we do not understand which contracts would be included in item (A) ("furthers the special relationship between the United States and Indians") that would not also be included in either item (B) ("Indians are the primary beneficiaries of the contract") or (C) ("the majority of the contract activity takes place * * * [in] an Indian reservation"). The distinction should be clarified or the item deleted.

We believe that the procedure described in section 23(c)(5) on page 7, lines 1 thru 13 should be the preferred method for contracts in excess of $25,000 because it provides the best means of determining the market price for the services or products involved and provides a preference for Indian firms. We understand that the Department of Housing and Urban Development has been using a procedure such as described in paragraph (5) under the authority in 25 U.S.C. 450e(b) mentioned above. In addition to providing a credible method of determining a price for a contract, such a method would—

> (1) increase competition and reduce or eliminate criticism of awarding contracts to Indian firms with no opportunity for others to compete;

(2) create an incentive for Indian firms to "sharpen their pencils" and thus become more competitive; and

(3) enable Indian firms that don't compete for other than Government contracts to do so by learning how to compete.

Therefore, we recommend—

(1) deletion of "(4)(A) A Federal agency shall" on page 6 line 10 and inserting in lieu thereof "(4) A Federal agency may";

(2) deletion of subparagraph (B) on page 6, lines 22 thru 25; and

(3) rewriting the first sentence in paragraph (5) on page 7, lines 1 thru 4 to read as follows:

> If a Federal agency does not limit competition as authorized in paragraph (4), the agency shall award the contract after full and open competition under this paragraph.

We have two problems with the first sentence of paragraph (6) starting on page 7, line 14. First, the "extraordinary circumstances" test for waivers of Indian preference under the Buy Indian Act is subject to dispute as to meaning. Second, the provision apparently would not permit waivers by a Secretary, Under Secretary, or Deputy Secretary because they are not "comparable to the rank of an assistant secretary of a Federal department." We recommend that the sentence be rewritten as follows:

> The preference requirements of this section may be waived by the head of a Federal agency as to a specific contract if the waiver is in the best interest of the Indians or where there is an overriding national interest. An agency head may not delegate authority to waive that requirement to other than an Under Secretary, Deputy Secretary, Assistant Secretary or equivalent official of the agency.

We recommend that the second sentence of paragraph (6) starting on page 7, line 18 be deleted because it duplicates a similar requirement of the Office of Federal Procurement Policy.

On page 8, lines 9 thru 11 reference is made to "construction (within the meaning of the Indian Self-Determination Act)" Section 4 of the Indian Self-Determination and Education Assistance Act does not define the term "construction' but does define "construction programs". We recommend that the bill be amended accordingly.

Regarding the "Advisory Committee on Indian Preference" mentioned on pages 9, 10, and 11 of the bill, we defer to the Department of Justice's constitutional concern. Beyond that we believe that such a Committee is not advisory because it would be authorized to certify enterprises as eligible for preference under the Buy Indian Act. We believe that a certification approach with penalties for false certifications is a more efficient method. The other functions for the Committee do not warrant the new organization and cost involved. Therefore, we recommend deletion of the provisions relating to the Committee and addition of a provision such as the following:

> (f)(1) Subject to paragraph (2), an agency may accept the following certifications as qualifying an enterprise as an

Indian-owned enterprise or Indian-controlled enterprise as defined in this section:

(i) a certification by an authorized officer of the enterprise that it is eligible for an award and qualifies as an Indian-owned enterprise or an Indian-controlled enterprise under this section; and

(ii) in the case of an entity other than an Indian or Indian tribe, a certification by the Indian(s), tribe(s), or certified Indian-owned enterprise(s) or certified Indian-controlled enterprise(s) who are owners of the entity as to their ownership interests and the qualification of each Indian owner as an Indian as defined in this section.

(2)(A) An agency need not accept a certification under paragraph (1) and at any time may require such additional evidence of eligibility as the agency finds desirable. An agency may disqualify an enterprise based on such evidence or on the failure of the enterprise or an owner to submit such evidence.

(B) An agency may disqualify an eligible Indian enterprise from receiving an award under this Act during a period that it is debarred from contracting with an agency.

(C) Any affected person may challenge the eligibility of an eligible Indian enterprise or a certification under this section and the agency shall undertake such inquiries as may be appropriate, including but not limited to requesting information under clause (1) of this subsection.

(3) In case of a false certification or the submission of false or misleading evidence or information under this section, the United States is entitled to the return of amount paid to an eligible Indian enterprise because of an award under this section. This remedy is in addition to any action under section 1001 of title 18, United States Code or other provision of law.

Additional Provisions

To preclude any conflict with the Indian Self-Determination Act which requires contracts by the Secretary of the Interior or the Secretary of Health and Human Services, we recommend that a new subsection be added to the revised section 23 as follows:

(h) This section does not alter the requirement for the award of a contract, grant, or cooperative agreement under the Indian Self-Determination Act to the recipient designated by a tribe.

We also recommend that the revised section 23 be made applicable to the Osage Tribe and the Five Civilized Tribes by amending section 33 of the 1910 Act which makes that section inapplicable to these Tribes. The amendment would be as follows:

SEC. 4. Section 33 of the Act of June 25, 1910 (36 Stat. 863; 25 U.S.C. 353) is amended by striking out "The provision of this Act" and inserting in lieu thereof "The provisions of this Act (except section 23)".

We recommend that the bill be amended to repeal (1) the 1908 Buy Indian Act provision cited as a source for the codified provision in 25 U.S.C. 47 and (2) section 7(b) of the Indian Self-Determination and Education Assistance Act. Both of these provisions would be unnecessary after enactment of S. 321. The amendment would be as follows:

> SEC. 5. The following provisions are hereby repealed:
> (1) The last proviso in the first paragraph under the subheading "SECRETARY" and heading "I. GENERAL PROVISIONS" in the Act of April 30, 1908, ch. 153, 35 Stat. 70, 71 (25 U.S.C. 47); and
> (2) Section 7(b) of the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 2205 (25 U.S.C. 450e(b)).

The current Buy Indian Act which is codified at 25 U.S.C. 47 was enacted as a portion of section 23 of an Act of June 25, 1910, chapter 431, session 2, 61st Congress, "An act to provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes." That Act contains thirty-three sections, only one of which relates to procurement of the products of Indian industry. We believe that in order to avoid confusion in the future when the Act of June 25, 1910 might be amended or repealed (and the Buy Indian Act might thereby be inadvertently repealed), it would be advisable to repeal section 23, and to make these proposed amendments the "Buy Indian Act of 1989".

This concludes my prepared statement and I will be pleased to respond to any questions the Committee may have.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, are required to be set out in this report. It is the opinion of the Committee that it is necessary to dispense with this requirement in order to expedite the business of the Senate.

○